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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

HELENA STOCKWELL et al.,

Plaintiffs, Cross-defendants and Respondents,

v.

WILMER E. WINDHAM et al.,

Defendants, Cross-complainants and Appellants.

2d Civil No. B183638
(Super. Ct. No. SC 036187)
(Ventura County)

This appeal arises from an agreement to convey defendants' interest in a Malibu condominium to plaintiffs. The trial court granted plaintiffs' motion for summary adjudication on their causes of action for specific performance, constructive trust, resulting trust, quiet title and declaratory relief. The trial court also granted plaintiffs' motion for summary judgment on defendants' cross-complaint for partition and accounting. Plaintiffs dismissed their remaining causes of action. Defendants appeal the ensuing judgment. We affirm.

FACTS

Allegations of Complaint

On March 9, 2003, Helena Stockwell, Floyd Merrell, Dian Merrell and Vivian March (hereafter "Stockwells") filed a complaint against Wilmer and Jeanne Windham. All the Stockwells are related by blood or marriage.

The complaint alleges that Wilmer Windham (hereafter "Windham") is an attorney who represented the Stockwells in the 1970's, and had a relationship with Vivian March until September of 1978.

In February of 1978, the Stockwells entered into an agreement to purchase a condominium in Malibu. Vivian March decided not to go forward with the purchase. Because the remaining Stockwells could not qualify for a loan, Windham agreed to participate. The Stockwells paid the $23,000 down payment and Windham executed documents for a loan in the amount of $94,000. Windham took an undivided one-third interest as a joint tenant.

On November 13, 1978, Windham wrote the Stockwells a letter. The letter stated that a deed executed by Windham was enclosed. The deed clarified that the parties would hold title as tenants in common, instead of joint tenants. The letter also stated that Windham had prepared a deed granting his interest to the Stockwells and leaving it up to them whether to record that deed. The letter said that in order to prevent the title from becoming confused, the deed conveying Windham's interest to the Stockwells cannot be executed until the deed clarifying title as tenants in common is recorded.

Finally, the letter stated: "For your protection in the interim, however, I wish to put our understanding in writing. As I have stated, I will convey my interest in the property without consideration and will maintain the obligation in my name until such time as you choose to dispose of the property. You and Dian and Floyd will assume whatever obligations are involved, however so that my credit rating is not damaged by late payments or the like. [¶] If at some future time you should sell the property and make some money, you might see fit to send me some small honorarium so that I don't feel totally stupid for having gotten into this. The amount is up to you, but I don't think it should be over $50,000."

Thereafter, the Stockwells had no contact with Windham for 20 years. Windham did not participate in any way in ownership of the property. The Stockwells paid all the expenses for the property.

In January of 1998, the Stockwells received a letter from Stephen Gray. Gray said that Windham had offered his one-third interest in the property in settlement of an unrelated lawsuit. The Stockwells' counsel wrote to Windham telling him not to convey the property. Windham replied demanding $35,000 not to proceed with the settlement, and threatening to convey the property to his wife. Thereafter, Windham withdrew his "attempted breach" of the 1978 oral agreement.

Beginning in March of 2002, the parties made a number of offers and demands for money to obtain a conveyance from Windham. In December of 2002, the parties reached an oral agreement that Windham would convey his interest for $7,000. In January of 2003, however, Jeanne Windham informed the Stockwells that she would not allow Windham to convey his interest for $7,000. On January 29, 2003, Windham conveyed his interest to himself and his wife, Jeanne, as joint tenants.

The Windhams demurred to the original complaint, based in part on the statute of limitations. The trial court sustained the demurrer with leave to amend. The trial court overruled the Windhams' demurrer to the first amended complaint. The Windhams cross-complained for partition and an accounting.

Motion for Summary Adjudication and Summary Judgment

The Stockwells made a motion for summary adjudication on their specific performance and related equitable causes of action, and for summary judgment on the cross-complaint. The undisputed facts are:

The Stockwells paid all of the down payment to purchase the condominium, but they were unable to qualify for a loan. Windham agreed to use his credit to qualify. Windham received record title to one-third interest in the property. Windham has paid no expenses associated with the condominium out of his pocket. Because Windham has a one-third interest, however, he claims credit for one-third of the revenue that was used to cover expenses. Windham sent the letter dated November 13, 1978, that put the parties' understanding in writing. On January 29, 2004, Windham conveyed record title to himself and his wife as joint tenants.

Windham and his wife submitted declarations in opposition to the motion. Windham declared in part:

"Twenty-six years ago, your declarant acquired, as an investment, a one-third interest in the condominium in Malibu, California, which is the subject of this litigation. [¶] . . . [¶]

"For the purchase [the Stockwells] put up the down payment of $23,000 and I filled out the loan application, qualified for the loan and put up my credit to produce the balance of $94,000.

"The original deed from the seller showed that each of the four grantees had a one-fourth interest, but since this was not our deal, I prepared a deed correcting the ownership as follows: One[-] third to Wilmer Windham, one[-]third to Helena Stockwell and one-third to Dian and Floyd Merrell as joint tenants; all as tenants in common.

"I sent this correcting deed together with a letter dated November 13, 1978 in which I attempted to clarify our relationship. A true copy of this letter is attached to the first Amended Complaint as Exhibit 1. There was no response to this letter.

"At the time I entered into this transaction, I was living with Jeanne Windham and in 1983, we were formally married. We moved to Montana in 1991.

"In 1982, Helena contacted me to try to convince me to sign a quit-claim deed. I declined unless my name could be taken off the loan, since this was causing credit problems for me, and unless I received some compensation for the use of my credit for the previous five years. On several later occasions, including in 1984, 1991 and 1994, we had conversations to the same effect but with no resolution.

"After several years of this, I decided that dealing with the [Stockwells] was futile and when, in 1998, I was involved in a lawsuit with a former colleague, I decided to try to settle the case by offering him my one-third interest in the Malibu condominium.

"He was interested in the proposition and, in January of 1998, Stephen Gray wrote to [the Stockwells], my co-owners in California, to inquire as to how a conveyance to him might be effected.

"By way of response, I received a letter from one Michael Dave, an attorney representing the [Stockwells], who challenged my claim of unfettered ownership and demanded that I sign a quitclaim deed. He also stated that if I had a wife, she must sign a quitclaim deed as well.

"I was not interested in doing this without the conditions I had previously proposed and after attempting on several occasions to contact Mr. Dave by telephone without success, I wrote a letter dated June 1, 1998 demanding $35,000 in order to sign a quitclaim deed and suggesting that if the matter could not be resolved on this basis I intended to formalize my wife's community property interest. . . . [¶] . . . [¶]

"On September 23, 2002, a letter addressed to me at 2266 Fox Hills Drive was sent by one Jonathan A. Jones. This letter begins, "I was the tenant who subleased your condominium . . . from June 1, 2002 through August 8, 2002." The letter goes on to detail his various grievances. Obviously, Helena was holding me out as the owner of the property. She forwarded this letter to me.

"I was aware that Helena Stockwell was managing the property and taking care of dealings with the condominium association and the succession of tenants. I always considered that she was doing so as agent for me and the Merrells."

Jeanne Windham declared:

"As of the date of acquisition of the property which is the subject of this litigation, I was living with Wilmer Windham. During the period we were living together, we cohabited in several common-law marriage jurisdictions.

"We were formally married in Sévres, France on August 1, 1983.

"I always understood that I was accruing an interest in the Malibu property.

"In 1984, we were doing estate planning and wanted to get out of the investment in the Malibu property. On a number of occasions, we had trouble getting financing because the loan on the Malibu property showed up on Mr. Windham's credit report.

"In January of 2003, I had a telephone conversation with Helena Stockwell in which she stated unequivocally that she and Mr. Windham had no agreement."

The trial court granted the Stockwells summary adjudication against the Windhams on their causes of action for specific performance, constructive trust, resulting trust, quiet title and declaratory relief. The court also granted the Stockwells summary judgment on the Windhams' cross-complaint. The Stockwells dismissed the remaining counts of their complaint, and final judgment was entered.

DISCUSSION

Summary judgment is properly granted only if all papers submitted show there is no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) The court must draw all reasonable inferences from the evidence set forth in the papers except where such references are contradicted by other inferences or evidence which raise a triable issue of fact. (*Ibid*.) In examining the supporting and opposing papers, the moving party's affidavits or declarations are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion. (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19.)

Where the plaintiff is the moving party he has the burden of producing admissible evidence on each element of the causes of action. (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 926.) If the moving plaintiff has met his burden, the burden shifts to the responding defendant to demonstrate the existence of a triable issue of material fact or a defense. (*Ibid.*)

A motion for summary adjudication proceeds in the same manner as a motion for summary judgment. (Code Civ. Proc., § 437c, subd. (b)(2).) It is properly granted if it completely disposes of a cause of action, an affirmative defense, a claim for damages or an issue of duty. (*Id.* at subd. (f)(1).)

I

The Windhams contend there are triable issues of material fact.

(a)

The Windhams argue there are triable issues of fact relating to whether there was a meeting of the parties' minds in 1978 about the mutual obligations of the parties.

But Windham's letter of November 13, 1978, sets out the agreement of the parties. The only reasonable interpretation of the letter is that the parties agreed that Windham would convey his interest in the property without consideration at such time as the Stockwells desired and, in exchange, the Stockwells would pay whatever obligations are involved.

The Windhams claim the letter expressly negates consideration. They also point out that the allegation of the first amended complaint is to the effect that the conveyance is to be without consideration. But taken in context, statements that Windham's conveyance is to be without consideration simply mean that Windham has no right to demand payment for his act of conveyance. The contract, however, itself is supported by consideration. The Stockwells agreed to pay all obligations relating to the property. Windham cites no authority to support his claim he was not obligated to pay the expenses in the first place.

Windham points to his declaration that there was no response to the letter. But insofar as the letter is a memorandum of the parties oral agreement, Windham cites no authority that any response was necessary. All the lack of response shows is that the Stockwells did not object to the memorandum of agreement.

Windham also points to his declaration that he "always considered" Helena Stockwell was managing the property as agent for himself and other owners. Of course, the parties' subjective intent or understanding is irrelevant to contract interpretation. (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club* (2003) 109 Cal.App.4th 944, 956.) The letter memorializing the parties' agreement

requires only that the Stockwells assume the obligations arising from the property. It does not provide that Helena Stockwell will manage the property as Windham's agent.

(b)

The Windhams argue there is a triable issue of material fact as to whether Windham had represented some of the Stockwells in previous unrelated litigation. But they fail to point out in their opening brief how such a contested fact is material to the present litigation. It is not until their reply brief that they attempt to demonstrate materiality. It is too late.

The Windhams have the burden of showing materiality on appeal. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 349, p. 394.) They should have discussed the matter in their opening brief. By waiting until their reply brief, they have deprived the Stockwells of the opportunity to respond, and the court of the opportunity to consider their response. We deem the argument waived. (*Id.* at § 616, pp. 647-648.)

In any event, the Windhams' attempt to show materiality is unavailing. The Windhams believe the question of prior representation is material because the Stockwells alleged breach of a confidential relationship. But the Windhams cite no authority that the Stockwells are required to show a confidential relationship to prevail on the causes of action that support this judgment.

(c)

The Windhams argue that there is a triable issue of material fact as to whether Jeanne Windham had an interest in the property. They assert Jeanne took her interest without notice of the Stockwells' claim.

It is undisputed that Windham executed a deed of the property to himself and his wife as joint tenants on January 29, 2004. Jeanne Windham's declaration does not expressly state that she had no notice of the Stockwells' claim. She declared only that "I always understood that I was accruing an interest in the Malibu property."

The burden is on the Windhams to show lack of notice. (*Hodges v. Lochhead* (1963) 217 Cal.App.2d 199, 203.) The Windhams cite no authority that

Jeanne's subjective understanding about her interest is sufficient to raise a triable issue of fact as to notice.

In any event, even assuming the improbable, that Jeanne Windham had no notice, the Windhams cite no authority that lack of notice alone is sufficient to defeat the Stockwells' claim. (See Civ. Code, § 1214 [requiring lack of notice and payment of value]; 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, §§ 327-328, pp. 384-385.) Nowhere does Jeanne Windham claim to have been a bona fide purchaser. Indeed, her claim appears to be that she somehow acquired an interest as marital property. She cites no authority to support that claim.

(d)

The Windhams argue there is a triable issue of fact whether the 1978 agreement was breached more than four years prior to the filing of the complaint. The Windhams are apparently referring to the statute of limitations. (See Code Civ. Proc., § 337, subd. (1).) Windham declared that in 1984 he told Helena Stockwell that he would not quitclaim his interest unless he was compensated. But it is uncontested that the Stockwells are and have been in possession of the property. Our Supreme Court in *Mucktarian v. Barmby* (1965) 63 Cal.2d 558, 560, stated that no statute of limitations runs against a plaintiff seeking to quiet title while he is in possession of the property.

Windham's reliance on *Ankoanda v. Walker-Smith* (1996) 44 Cal.App.4th 610, 617, is misplaced. There the owner of property made a conveyance to herself and her lessee as cotenants. The owner made the conveyance under the mistaken belief that a government loan program required the lessee to be on the title to the property. In 1989, the owner learned her lessee was claiming an ownership interest in the property. The owner did not bring a quiet title action until 1993. The Court of Appeal held the action was barred by the three-year statute of limitations for an action to set aside a deed for fraud or mistake. (Code Civ. Proc., § 338, subd. (d).) The court distinguished *Mucktarian* on the ground that the case should only apply where the plaintiff's possession is exclusive and undisputed. (*Ankoanda*, *supra*, at pp. 616-618.)

The Windhams argue the Stockwells were not in exclusive possession. They point out that for much of the time the Stockwells' possession was through their tenants. The Windhams concede that an owner may be in possession through his tenants. (Citing *San Francisco Unified School Dist. v. City and County of San Francisco* (1942) 54 Cal.App.2d 105, 111-112.) They claim, however, without citation to authority, that because they were co-owners, the tenants placed in possession by the Stockwells were also their tenants. But each cotenant has a separate right to lease the premises. (See 5 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 12:3, p. 7.) The Stockwells' tenants did not become the Windhams' tenants. (*Ibid.*)

In any event, the holding in *Muktarian* was not limited to exclusive and undisputed possession. Moreover, *Ankoanda* is distinguishable on its facts. There the plaintiff seeking to quiet title was not in actual possession, the defendant was. Here the Windhams never sought entry, their only demand was for money. It serves no useful purpose to apply a limitations period to plaintiffs who are undisturbed in their possession. *Muktarian* applies here. The Stockwells' action is not barred by the statute of limitations.

It is irrelevant that the trial court in sustaining the Windhams' demurrer with leave to amend, expressed the opinion that the Stockwells' claims are time barred. The court in granting summary judgment to the Stockwells correctly recognized that their claims are not barred.

(e)

The Windhams argue there is a triable issue of fact whether Helena Stockwell should be bound by her statement that she and Windham had no agreement.

The only evidence of such a statement is in Jeanne Windham's declaration. She declared only that, "In January of 2003, I had a telephone conversation with Helena Stockwell in which she stated unequivocally that she and Mr. Windham had no agreement." The declaration provides no context for the statement. It may well have referred to Windham's demand for money. The declaration is too vague and ambiguous to constitute substantial evidence. In light of the letter unequivocally showing that Windham had made an agreement, the declaration fails to raise a material issue of fact.

(f)

Windham argues there is a triable issue of material fact whether Helena Stockwell held him out to a tenant as the owner of property.

The only evidence on the matter is a letter sent to the Windhams at their California address. The letter was from a tenant of the condominium detailing various grievances. Windham simply speculates that the tenant sent the letter to him because Helena Stockwell held him out to be an owner. Such speculation is insufficient to raise a material issue of fact.

In any event, the Windhams fail to explain in their opening brief how the evidence is material. Even if the Stockwells had held Windham out to be an owner, it would not contradict Windham's promise to convey his title to the Stockwells.

(g)

The Windhams argue there is a triable issue of fact whether Vivian March should be given judgment. Like many of the Windhams' arguments, the argument presents a question of law, not fact.

In any event, the Windhams fail to explain how they could be prejudiced by a judgment that includes March. Windham agreed to convey his entire interest to at least some of the plaintiffs. A judgment specifically enforcing that agreement leaves the Windhams with no interest even if March were excluded from the judgment.

II

The Windhams contend the Stockwells are bound by the allegations of their original complaint. They cite *Hill Transp. Co. v. Southwest Forest Industries, Inc.* (1968) 266 Cal.App.2d 702, 709, for the proposition that the trial court is bound to examine the original complaint to discover whether the new pleading is untruthful or a sham.

In the Stockwells' original complaint they alleged that on June 1, 1998, Windham demanded $35,000 to convey his interest to the Stockwells, coupled with a threat to convey his interest to his wife. The Windhams believe this allegation relates to the start of the running of the statute of limitations. But as we have previously discussed,

because the Stockwells were in possession, the statute did not run. Any change or omission in the amended complaint is irrelevant.

The Windhams also point out that the original complaint alleged that Jeanne Windham interfered with contract by, among other things, "threatening to assert and/or asserting her community property interests against plaintiffs . . . ." Windham points out that allegation was omitted from the amended complaint.

Apparently, the Windhams take the allegation contained in the original complaint as an admission that Jeanne Windham has a community property interest in the condominium. But taken in context, the original complaint does not admit Jeanne Windham has an interest in the condominium. In context, the Stockwells alleged nothing more than that Jeanne Windham is asserting a claim to an interest in the property. That is not an admission that she in fact has an interest. Even if it could be taken as an admission that she has an interest, it is not an admission that her interest is superior to the Stockwells' claim.

III

The Windhams contend specific performance will not lie.

(a)

The Windhams argue that the identity of the grantee or grantees cannot be determined. But it is clear from Windham's letter memorializing the agreement that the transfer is to be at least to those who originally took title with Windham. As we have previously stated, that the judgment included Vivian March is not prejudicial to Windham.

The Windhams also claim it is uncertain how much Windham was to receive in the event of a future sale. The letter states only that if the property is sold at a profit in the future, "[Y]ou might see fit to send me some small honorarium . . . . The amount is up to you . . . ." The letter discloses no obligation to pay Windham anything.

(b)

The Windhams argue the Stockwells have not offered to do equity. They cite Civil Code section 3391, subdivision (2), for the proposition that to be specifically

enforceable the contract must be just and reasonable. They claim it is unreasonable to make Windham convey his interest in the property, but still have the debt reflected on his credit reports.

But that is what Windham agreed to do. As the trial court pointed out, Windham was an attorney at the time he entered into the agreement. He must have known the consequences of his agreement. There is nothing unjust or unreasonable about holding him to the bargain he made.

(c)

The Windhams argue specific performance requires the consent of Jeanne Windham, and there is no basis for a judgment against her.

But the memorandum letter clearly shows that Windham's interest in the property is subordinate to the Stockwells' claim to his interest. Whatever interest Jeanne Windham may have is derived from Windham's subordinate interest. The general rule is that one cannot acquire a greater interest than her grantor had at the time of the conveyance. (*Gwin v. Camp* (1938) 25 Cal.App.2d 10, 12.) Windham cites no authority that would make Jeanne Windham's interest superior to the Stockwells' claim. Thus because Windham's interest is subject to specific performance, so is whatever interest Jeanne Windham may have acquired through Windham. The trial court properly entered judgment against her.

(d)

The Windhams argues Evidence Code sections 637 and 638 do not apply.

Evidence Code section 637 states, "The things which a person possesses are presumed to be owned by him." Evidence Code section 638 states, "A person who exercises acts of ownership over property is presumed to be the owner of it." The Windhams argue the presumptions are rebutted by his record title. Moreover, they believe the tenants through which the Stockwells held possession were also their tenants. But the statutory presumptions are not necessary to the Stockwells' case. Windham's letter memorializing the parties' agreement clearly shows the Stockwells are entitled to specific performance.

IV

The Windhams contend the Stockwells are not entitled to attorney fees.

The judgment includes a provision allowing the Stockwells to recover fees as costs pursuant to Civil Code section 3306a. Civil Code section 3306a allows a plaintiff to recover fees for breach of an agreement to deliver a quitclaim deed. The Windhams object because the judgment requires them to deliver a grant deed.

The judgment awards no specific amount for fees. A motion for fees was pending at the time the notice of appeal was filed. Because no fees have been awarded, an appeal on the question of attorney fees is premature.

The judgment is affirmed. Costs are awarded to respondents.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

Kent M. Kellegrew, Judge

Superior Court County of Ventura

Wilmer E. Windham, in pro. per., and for Defendants, Cross-complainants and Appellants.

Andrea Merrell Caster and Lawrence M. Lebowsky for Plaintiffs, Cross-defendants and Respondents.